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MEMORANDUM

TO: Clerks of Superior Court
Assistant Clerks of Superior Court
Deputy Clerks of Superior Court
Superior Court Judges

FROM: Matt Kraus, Assistant Legal Counsel

DATE: September 29, 2021

SUBJECT: G.S. Chapter 35A Guardianships and single protective arrangements or transactions; [S.L. 2021-53](#)¹

On June 25, 2021, the Governor signed into law Senate Bill 50², Session Law 2021-53, (hereinafter “the Act”). The Act contains various changes to the North Carolina General Statutes regarding estates, trusts, and guardianships. These changes were enacted upon the recommendations of the North Carolina Bar Association. Due to the significant changes made in the area of guardianships under G.S. Chapter 35A, this memorandum focuses solely on the modifications made to Article 2 of G.S. Chapter 35A and the resulting impacts on matters before the clerks of superior court and superior court judges.

Section 2.2 of the Act adds a new G.S. 35A-1121 under Article 2 of G.S. Chapter 35A allowing the clerk of superior court discretion, subject to certain considerations, to authorize a single protective arrangement or single transaction for an incompetent person or a minor without appointing a guardian. If the presiding clerk authorizes a single protective arrangement or single transaction, the clerk, in lieu of or in addition to the appointment of a guardian, may appoint a special fiduciary or temporary guardian to execute the transaction or assist in carrying out the protective arrangement or transaction. Conforming changes are made in an amended G.S. 35A-1120. These changes are effective October 1, 2021 and apply to proceedings initiated on or after that date.

Single Protective Arrangements or Single Transactions

G.S. 35A-1121(a)(1) provides that the clerk may order a single transaction or single protective arrangement for the benefit of an incompetent person or minor that authorizes, directs, or ratifies any transaction necessary or desirable to achieve any service, care, or safety arrangement that meets the foreseeable needs of the minor or incompetent person. The clerk may authorize a special fiduciary to execute any such transaction on behalf of the minor or incompetent person. These single transactions or single protective arrangements are not limited to, but may include:

¹ This memo will be available on the NCAOC’s Juno website for Judicial Branch users at <https://juno.nccourts.org/legal-memos>, under “Legal Memos.”

² <https://www.ncleg.gov/Sessions/2021/Bills/Senate/PDF/S50v6.pdf>

- The payment, delivery, deposit, or retention of funds or property.
- The sale, mortgage, lease, or other transfer of property in accordance with the requirements of G.S. 35A-1121(c).
- The entry into an annuity contract, a contract for life care, a deposit contract, or a contract for training and education.
- The establishment, funding, or addition to a suitable trust, including, but not limited to, a trust for the benefit of the minor or incompetent person pursuant to 42 U.S.C. § 1396p(d)(4).
- The establishment, funding, or administration of an ABLÉ account, as defined in section 529A of the Internal Revenue Code.

G.S. 35A-1121(a)(2) provides that the clerk may order a single transaction or single protective arrangement that, authorizes, directs, or ratifies any contract, trust, or other transaction relating to the minor or incompetent person's property and business affairs. The clerk may authorize a special fiduciary to execute any such contract, trust, or other transaction on behalf of the minor or incompetent person if the clerk of superior court determines that the transaction is in the best interest of the minor or incompetent person.

Before ordering a single protective arrangement or single transaction, the clerk is required to consider the interests of creditors and dependents of the minor or incompetent person. The clerk must also determine whether the minor or incompetent person needs the continuing protection of a guardian. G.S. 35A-1121(b). Thus, notwithstanding the single protective arrangement or single transaction, if the minor or incompetent person will need the continuing protection of a guardian, clerks may need to appoint a guardian for the minor or incompetent person.

For example, if a clerk determines that a minor or incompetent person will have a continuing need for management of their personal affairs or estate that cannot be effectuated through a single transaction or single protective arrangement, the clerk may find that ordering a single protective arrangement or transaction pursuant to G.S. 35A-1121 is not appropriate and proceed with the appointment of a guardian of the person, guardian of the estate, or general guardian pursuant to G.S. 35A-1120. The adjudication of incompetence removes significant rights, including the ward's ability to make important decisions, and therefore, the clerk may need to appoint a guardian to ensure that the ward is not left without a surrogate decision maker. If a clerk finds that a minor or incompetent person needs a single protective arrangement or transaction but also has a continuing need for a guardian of the person or guardian of the estate to manage their personal affairs or estate, the clerk may proceed with the appointment of a guardian of the person or guardian of the estate and order a single protective arrangement or transaction. An example of this would be when an incompetent person has a continuing need for a guardian of the person but has a need for a single protective arrangement or transaction to handle one aspect of his or her estate.

Incompetent Person

Prior to authorizing a single protective arrangement or transaction, it must first be "established in a proper proceeding that a basis exists for the appointment of guardian" for an adult. Thus, the respondent in an incompetency proceeding must first be adjudicated incompetent before the clerk may authorize a single protective arrangement or single transaction. A party may seek, and the clerk may enter, an order authorizing a single protective arrangement or transaction immediately following an adjudication of incompetency or at any time after the appointment of a guardian. If the clerk previously

appointed a guardian, an interested person may file a motion in the cause pursuant to G.S. 35A-1207 requesting the clerk to order the single protective arrangement or single transaction and to appoint a special fiduciary or temporary guardian.

Minor

The Act also gives the clerk the discretion to order a single protective arrangement or transaction for the benefit of a minor “[i]f it is established that a basis exists for the appointment of a guardian of a minor.” G.S. 35A-1121(a). If a guardian has not previously been appointed pursuant to Article 6 of G.S. Chapter 35A (Appointment of Guardian for a Minor), then the party requesting a single protective arrangement or transaction should first file an application for appointment of a guardian for a minor and request an order for a single protective arrangement or transaction. If the clerk previously appointed a guardian, an interested person may file a motion in the cause pursuant to G.S. 35A-1207 requesting the clerk to order the single protective arrangement or single transaction and to appoint a special fiduciary or temporary guardian.

Special Fiduciary

Special fiduciary is not defined in G.S. 35A-1121 and is a new fiduciary role under G.S. Chapter 35A. The clerk’s order prescribes the special fiduciary’s authority to act on behalf of the incompetent person or minor. A special fiduciary is not a guardian, and therefore, other statutes within G.S. Chapter 35A that impose duties on a guardian do not apply to a special fiduciary unless specifically incorporated in the clerk’s order. A special fiduciary is not required to qualify or obtain letters. A special fiduciary is not required to be bonded unless the clerk so orders. Unless the clerk orders a special fiduciary to account to the clerk or otherwise report to the clerk, the special fiduciary is not required to do anything further after the order appointing the special fiduciary is entered. Special fiduciaries will be required to take an oath or affirmation pursuant to G.S. 11-11. If a special fiduciary will administer any asset of a minor or incompetent person, the clerk must assess estate administration fees pursuant to G.S. 7A-307(a).

Temporary Guardian

A temporary guardian is not defined in G.S. 35A-1121 and is a new fiduciary role created through G.S. 35A-1121(b). Instead of appointing a special fiduciary, the clerk may appoint a temporary guardian to assist in the accomplishment of a single protective arrangement or single transaction. A duly qualified temporary guardian will have the authority conferred in the order appointing the temporary guardian and serve until discharged by order after reporting to the clerk of superior court of all matters done pursuant to the order of appointment. The temporary guardian must qualify and receive letters after filing an application, take an oath or affirmation pursuant to G.S. 11-11, receive a bond pursuant to Article 7 (if applicable), and file an accounting. A temporary guardian serves until discharged by order after reporting to the clerk of all matters done pursuant to the order of appointment. A new AOC form, Letters of Appointment Temporary Guardian, will be released to allow the clerk, after qualification of the temporary guardian, to specify the terms of the temporary guardianship and the limitations on the temporary guardian’s authority. Other existing AOC forms will be modified due to this legislation as well. If the court’s order authorizes a temporary guardian to receive any assets, the clerk may allow commissions as set forth in G.S. 35A-1269. If the temporary guardian will administer any asset of a minor or incompetent person, the clerk must assess the estate administration fees pursuant to G.S. 7A-307(a).

Sale, Mortgage, Lease, or Exchange of Real Property and Gifting of Property

If the court appoints a special fiduciary or temporary guardian to execute a single transaction or single protective arrangement to sell, mortgage, exchange, lease, or gift property, the special fiduciary or temporary guardian must follow the same procedural and reporting requirements as a guardian of estate or general guardian. G.S. 35A-1121(c). This new legislation does not give the clerk the discretion to waive these statutory requirements. For example, if the court appoints a special fiduciary to sell a ward's real property, the clerk would be required to appoint a commissioner and the judicial sale procedures in Article 29A of G.S. Chapter 1 would apply.

Q&A and Examples

Can the clerk order a single protective arrangement without appointing a guardian?

If the clerk determines, after considering the interests of creditors and dependents, that (i) a single protective arrangement or transaction will serve the best interests of the minor or incompetent person and (ii) the minor or incompetent person does not have the continuing need of a guardian of the person, guardian of the estate, or general guardian, the clerk is not required to appoint a guardian of the person, guardian of the estate, or general guardian for a minor or incompetent person. However, the clerk should proceed with caution if the clerk does not appoint a guardian for an incompetent adult because the adjudication of incompetence removes significant rights, including the ward's ability to make important decisions, but leaves the ward without a surrogate decision maker.

For example, a minor with living parents, or an incompetent person with an effective health care power of attorney, may benefit from the clerk only ordering a single protective arrangement or single transaction to handle a single aspect of his or her estate, so long as the clerk otherwise determines that there will be no continuing need for the protection of a guardian for the minor or incompetent person.

Is the clerk required to order a single protective arrangement or transaction?

The clerk has the discretion to order a single protective arrangement or transaction but is not required to do so. If a request is made for a single protective arrangement or transaction, the clerk may allow or deny the request after hearing and consideration of the evidence presented. The clerk should make written findings of fact and conclusions of law, and enter an order consistent with the clerk's findings and conclusions. The statute does not clarify the standard of review on appeal, so clerks are advised to record hearings on motions requesting the clerk order a single protective arrangement or transaction.

How is a special fiduciary or a temporary guardian different than an interim guardian?

Although these fiduciary roles are all limited in time and authority granted, the differences are significant. The appointment of an interim guardian is only an available tool in a pending incompetency proceeding. Once a respondent is adjudicated incompetent, interim guardianship is no longer an option. Further, the appointment of an interim guardian is not authorized for minors under Article 6 of G.S. Chapter 35A (Appointment of Guardian for a Minor). Unlike interim guardianships, the appointment of a special fiduciary or temporary guardian is available for both minors and a person who has been adjudicated incompetent under G.S. Chapter 35A.

Since it is anticipated that there will be questions or other issues unanswered herein, court officials with any questions or matters requiring discussion are welcome to contact Matt Kraus at Matthew.R.Kraus@nccourts.org (919-890-1316) or Nicole Brinkley at Nicole.N.Brinkley@nccourts.org (919-890-1302). Thank you.